

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-5374

MICHAEL LEE SMITH,
Petitioner

v.

STATE OF MARYLAND,
Respondent

for RSP
BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

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PRELIMINARY COMMENTS

This response to the Petition for Writ of Certiorari is filed pursuant to the request of this Court dated October 27, 1978.

OPINION BELOW

The decision of the Court of Appeals of Maryland in this case is now reported as Smith v. State, 283 Md. 156, 389 A.2d 858 (1978).

JURISDICTION

Petitioner has invoked Title 28, Section 1257(3) United States Code as a basis for jurisdiction in this case.

QUESTION PRESENTED

Does a pen register not constitute a search and seizure under the Fourth Amendment of the United States Constitution?

STATEMENT OF THE CASE

Respondent accepts the Petitioner's Statement of the Case.

STATEMENT OF FACTS

The facts set forth by Petitioner are accepted by the Respondent.

ARGUMENT

THE PEN REGISTER DOES NOT CONSTITUTE A SEARCH AND SEIZURE UNDER THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court has aptly described the limited nature of the "intrusion" which the pen register device accomplishes in United States v. New York Telephone Company, 98 S.Ct. 364 (1977), as follows:

"Indeed, a law enforcement official could not even determine from the use of a pen register whether a communication existed. These devices do not hear sound. They disclose only the telephone numbers that have been dialed - a means of establishing communication. Neither the purport of any communication between the caller and the recipient of the call, their identities, nor whether the call was even completed are disclosed by pen registers. Furthermore, pen registers do not accomplish the 'aural acquisition' of anything. They decode outgoing telephone numbers by responding to changes in electrical voltage caused by the turning of the telephone dial (or the pressing of buttons on pushbutton telephones) and presenting information in a form to be interpreted by sight rather than by hearing." 98 S.Ct. 369-370.

In light of the minimal extent to which the pen register "seizes" a telephone number dialed, the respondent contends that the Fourth Amendment has no application to the device. It is correct, however, that this Court found it unnecessary to decide the precise question in New York Telephone, because the government conceded the applicability of the Fourth Amendment, see 98 S.Ct. 369, f.n. 7. Likewise, in United States v. Giordano, 416 U.S. 505 (1974), the Court refused to address the constitutional issue, which again was not vital to the result. 416 U.S. 554, f.n. 4, concurring and dissenting opinion of Mr. Justice Powell.

Although there appears to be some split of authority on the subject, the cases which advert to the need for a warrant to use a pen register usually arise in two distinct ways.

Several of the "warrant" cases occurred, where the government sought to use a pen register in conjunction with a wiretap, for which a warrant was certainly needed. Besides Giordano, these cases include United States v. Brick, 502 F.2d 219 (8th Cir. 1974) and United States v. John, 508 F.2d 1134 (8th Cir. 1975), cert. den. 421 U.S. 962 (1975). In other cases the question arises where the Government, presuming or conceding the need for a warrant, has requested same from the District Court (or an order forcing the telephone company to comply with a request for pen register installation) to use the device. Illustrative cases are In Application of United States, etc., 538 F.2d 956 (2nd Cir. 1976), United States v. Illinois Bell Telephone Company, 531 F.2d 809 (7th Cir. 1976) and United States v. Southwestern Bell Telephone Co., 546 F.2d 243 (8th Cir. 1976).

Those cases which have faced the question on the merits have held that a warrant is not required before the installation of a pen register. United States v. Clegg, 509 F.2d 605 (5th Cir. 1975), and United States v. Baxter, 492 F.2d 150, 167 (9th Cir. 1973). The Ninth Circuit well explicated the reasons why a warrant for a pen register was not mandated in Hodge v. Mountain States Telephone and Telegraph Company, 555 F.2d 254 (9th Cir. 1977), a recent case involving a civil action for damages arising out of an alleged invasion of privacy:

"A pen register record for a particular telephone contains information different from the telephone company billing records for that telephone. Telephone company billing records show only completed calls, not, as with a pen register, the numbers dialed. Furthermore, a pen register record shows the dialing of telephone numbers, which, even if completed would not be shown by billing records because the numbers are within a local dialing area. It could be argued that since no records of such calls are normally maintained, an expectation of privacy exists. This admitted difference, is not, in our view, of constitutional dimension and is more than off set by the fact that pen register records are even farther removed than billing records from the content of the communications. Viewed in the round, the information recorded by pen registers is not entitled to Fourth Amendment protection." 555 F.2d 256-257.

The concurring opinion of Judge Hufstedler also recognized that "the expectation of privacy protected by the Fourth Amendment attaches to the content of the telephone conversation and not to the fact that a conversation took place." 555 F.2d 266.

In further support of its opinion, the Maryland Court of Appeals cited Note, The Legal Constraints Upon the Use of the Pen Register as a Law Enforcement Tool, 60 Cor. L.R. 1028 (1975). In that article, the commentator found two strong bases for concluding that the pen register was not a "search and seizure" controlled by the Fourth Amendment:

"First, even assuming that a privacy expectation is in fact present, it is well settled that toll calls (and their records) are not entitled to a reasonable expectation of privacy. And, with respect to most areas of the country, there seems to be no valid distinction between the expectations associated with local calls on the one hand and those calls that crossed the local billing zone on the other hand. The majority of subscribers probably have no real knowledge as to the geographic boundaries of their 'local call' zone. Second, all telephone subscribers must utilize equipment owned by a third party...in order to place a call. It is therefore, unreasonable for a subscriber to assume that the fact of this call passing through the telephone system will remain a total secret from the telephone company. Once this assertion is accepted, it is clear that there can be no reasonable expectation of privacy from law enforcement authorities with respect to the dialed pulses detected and recorded by the telephone company." 60 Cor. L.R. 1044-1045.

Respondent respectfully suggests that the foregoing legal analysis is ample support for the the holding of the Court of Appeals of Maryland in this case.

Furthermore, Respondent adopts the reasoning of the Court of Appeals in regard to this issue. With compelling and straightforward logic, the Court of Appeals majority put forth its view as to the "reasonable expectation of privacy" in the context of a pen register:

"While the content of a call is not revealed to the telephone company, the information as to the number dialed must necessarily be revealed, since it is through telephone company switching equipment that calls are completed. As a recipient of such information, the company may reveal it since the caller can have no reasonable ex-

pectation that it will remain privated. In fact, the caller should have even less of a justified expectation of privacy, since unlike the disclosures in White and Miller the use of a pen register does not reveal the contents of a communication." 283 Md. 171-172.

The references in the foregoing quotation are to United States v. White, 401 U.S. 745 (1971), wherein this Court held that there was no expectation of privacy in one's statement to a person who turns out to be a police informant, and United States v. Miller, 425 U.S. 435 (1976), where this Court held that a bank depositor had no reasonable expectation of privacy in the contents of checks and deposit slips turned over to the bank. The reasoning of the Court of Appeals, that the number dialed is necessarily information divulged to the telephone company, cannot be assailed. On this basis, it is submitted that the ultimate holding of the Court of Appeals is not only legally correct, but consistent with the cases decided in this Court since Katz v. United States, 389 U.S. 347 (1967), which define the "reasonable expectation of privacy" which is afforded the protection of the Fourth Amendment.

CONCLUSION

For all of the foregoing reasons, Respondent requests this Honorable Court to deny the Petition for Writ of Certiorari filed in this case.

Respectfully yours,

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